SUPREME COURT, U. S.

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NO. 756

IN THE

Supreme Court of the United States

October Term, 1965

HENRY DAVID and wife, GRACE DAVID, *Petitioners*

v.

ROBERT L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE, *Respondent*

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

To The United States Court of Appeals For The Fifth Circuit

Of Counsel:

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Petitioners respectfully move the Court for leave to file out of time, the annexed petition for rehearing of the order of this Court denying the Petition for Writ of Certiorari in this case, entered on January 17, 1966.

Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the decision of the Court

of Appeals for the Ninth Circuit in *Fulton Container Co., Inc. v. United States of America,* filed January 10, 1966, is in direct conflict with that of the Court of Appeals for the Fifth Circuit in this case, and thus has created a conflict of decisions in the Courts of Appeals which should be resolved by this Court.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time. The Court clearly has power, in its discretion, to entertain the petition. *Clark v. Manufacturers Trust Co.,* 337 U.S. 953, 338 U.S. 241; *Stone v. White,* 300 U.S. 643, 301 U.S. 532, 533; *Silesian American Corp. v. Clark,* 330 U.S. 852, 332 U.S. 469, 474.

WHEREFORE, it is prayed this motion be granted and the annexed petition for rehearing be filed with the Court.

DATED: April 25, 1966.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

This will certify in conformance with Rule 33-2(a) and 3(b) of this Court that a copy of this Petition for Rehearing for Writ of Certiorari was placed in the United States Mail, postage prepaid this 21st day of April, 1966, properly addressed to the Counsel for Respondent as follows:

Hon. Louis F. Oberdorfer
Assistant Attorney General
Tax Division
Department of Justice
Washington, D. C.

Attention: J. S. Cohen
Solicitor General
Department of Justice
Washington, D. C.

Joe H. Reynolds

JOE H. REYNOLDS

END